extent a cable operator is not providing telecommunications services, it is not obligated to provide interconnection at all.[57]

In accordance with the sliding scale of obligations imposed under Section 251, the interconnection required to be provided by a telecommunications carrier pursuant to subsection (a) need not be direct. By its terms, Section 251(a) provides the telecommunications carrier receiving an interconnection request with full discretion to decide whether to interconnect "directly or indirectly" with any requesting carrier.[58] Likewise, the Act permits telecommunications carriers to vary the type and manner of interconnection provided pursuant to Section 251(a).[59] Because CLECs will lack market power, there is no danger that the exercise of their discretion to interconnect directly or indirectly will be animated by anything other than a desire to maximize their competitiveness and customer base.[60] Accordingly, the

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[57] See, e.g., id. § 251(a) (limiting interconnection obligation only to telecommunications carriers); Notice ¶ 246 (tentatively concluding that only carriers "engaged in providing for a fee local, interexchange, or international basic services, directly to the public" fall within the definition of "telecommunications carrier") Consistent with Section 621 of the 1984 Cable Act, a cable operator need only provide interconnection with its system only to the extent that it is offering telecommunications services. See 47 U.S.C. § 541(c) (barring common carrier regulation of "any cable system" by virtue of its provision of "any cable service"). Likewise, cable operators and other non-incumbent telecommunications carrier are required to interconnect solely with "other telecommunications carriers." Id. § 251(a)(1). Thus, there is no requirement to provide would-be multichannel video programming distributors with interconnection to facilities used to provide cable service. Cf. Joint Memorandum of Regional Bell Operating Companies and GTE re Implementation of Section 251, at ¶ 23 (noting that cable service providers, to the extent they are only engaged in the provision of cable television service, are not telecommunications carriers).

[58] Id.

[59] Where Congress intended to require carriers to fulfill obligations imposed by Section 251 in a uniform and non-discriminatory manner, it expressly specified such a requirement. See, e.g., 47 U.S.C. § 251(c)(2)(C); id. at § 251(c)(2)(D).

[60] Owen Declaration at 8-9.

Commission should specify that CLECs have complete discretion regarding whether to interconnect directly or indirectly with any other telecommunications carriers.[61/]

Congress's decision to differentiate between the interconnection obligations imposed upon ILECs and other telecommunications carriers reflects the fact that while "it makes perfect sense for the time being to impose 'essential facility' obligations on the ILECs, it makes no economic sense to impose such obligations on CLECs."[62/] In addition, the Congressional interest in ensuring interconnectivity between customers of competing networks is satisfied through the requirement that ILECs provide direct connection to all requesting telecommunications carriers. Because CLECs lack market power in the provision of telecommunications services, they will have a strong incentive to interconnect with ILEC facilities in order to maximize the potential reach of their service offerings.[63/]

The statutory scheme also recognizes distinctions in the resale obligations of CLECs and ILECs.[64/] Indeed, lacking market power, CLECs should be free from any obligation to resell their services prior to their networks being fully deployed and operational.

[61/] Cf. Notice ¶ 248.

[62/] Owen Declaration at 8.

[63/] See id. at 9. The Commission has recognized in the context of CMRS-to-CMRS interconnection that "[CMRS] end users can currently interconnect with users of any other network through the LEC landline network." Interconnection and Resale Obligations Pertaining to Commercial Mobile Services, Second Notice of Proposed Rulemaking, CC Docket No. 94-54 at ¶ 30 (released April 20, 1995).

[64/] See id. at §§ 251(c)(4)(A) and § 252(d)(3). The Act provides that CLECs have a duty "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services." 47 U.S.C. § 251(b)(1). By contrast, ILECs have a duty "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." Id. at § 251(c)(4)(A). ILECs also have a duty "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services." Id. at § 251(c)(4)(A).

The rationale for requiring unrestricted resale[65] is that carriers with market power could use resale restrictions to engage in price discrimination and other anticompetitive conduct.[66] In determining whether limitations on resale are reasonable, the Commission "must weigh any adverse impact on the public interest against the countervailing benefits to the public."[67] The public harm from imposing broad resale obligation on CLECs, at least until they have fully developed their networks, would outweigh any benefits. If required to permit resale of all of their services immediately, new entrants' use and upgrading of their own networks would be handicapped by the demands of their reseller customers. Applying a resale requirement to new market entrants would serve no purpose and would cripple the ability of such participants to establish and use their own networks and facilities at the very moment that they begin to provide service in competition with the incumbent.[68]

There is no evidence that CLECs have the incentive or market power to limit resellers' ability to compete in retail sales.[69] It is more likely that CLECs will have a powerful

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[65] See, e.g., Regulatory Policies Report and Order, Concerning Resale and Shared Use of Domestic Public Switched Network Services, Report and Order, 83 F.C.C 167, 193 (1980) ("Resale and Shared Use of Common Carrier Domestic PSN Services"); Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Report and Order, 60 F.C.C 2d 261, 280-281 (1976) ("Resale and Shared Use of Common Carrier Services"), modified on other grounds, 62 F.C.C. 2d 588 (1977), aff'd sub nom. American Tel. & Tel. Co. v. Federal Communications Commission, 572 F.2d 17 (2d Cir. 1978), cert. denied, 439 U.S. 875 (1978).

[66] See Resale and Shared Use of Common Carrier Domestic PSN Services, 83 F.C.C. 2d at 174-175; Owen Declaration at 8.

[67] Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, Report and Order, 7 FCC Rcd 4006, 4008 (1992) ("Cellular Resale Policies"), citing Resale and Shared Use, 60 F.C.C. 2d at 281-283; Hush-a-Phone Corp., 238 F.2d 266.

[68] Owen Declaration at 10

[69] Id.

incentive to engage in each aspect of providing service -- including retail marketing -- in the least cost manner. This will most often include the use of resellers to make their services broadly available.[70] The Commission has the authority and the responsibility to ensure that the resale obligations of new entrants do not adversely impact their ability to engage in facilities-based competition with the ILEC. It should exercise that authority to clarify that deferring the duty of CLECs to engage in resale is not an "unreasonable limitation."[71]

Consistent with Commission precedent, any resale by new entrants should not be price regulated. The Commission has determined on previous occasions that price regulation is not necessary with respect to carriers that lack market power because the operation of market forces will amply protect the public interest.[72] As new entrants, CLECs have strong incentives to act "in the least-cost manner" -- regardless of whether such cost-minimization "involves use of independent resellers or vertical integration or both" -- in order to be able to reduce prices and increase sales volume.[73] Because of these strong incentives to minimize costs, "there is no reason to expect that decisions by CLECs relating to either bundling of services sold to resellers or prices charged to resellers will have an adverse effect on competition or consumer

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[70] Id. at 11.

[71] At a minimum, the Commission should limit CLECs' resale duties to basic telephone exchange service. This at least would avoid creating disincentives for the construction of facilities for the provision of advanced services.

[72] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fourth Report and Order, 95 F.C.C. 2d 554, 579 (1983), vacated American Tel. & Tel. Co. v. Federal Communications Commission, 978 F.2d 727 (D.C. Cir. 1992).

[73] Owen Declaration at 10

welfare."[74] Accordingly, there are no grounds for imposing price regulation on resale by CLECs.

B. The Commission Must Preclude State Efforts to Impose ILEC Regulations on CLECs

The Act empowers the Commission to preclude enforcement of State rules that are inconsistent with the requirements of Section 251 or that substantially prevent implementation of those requirements and the purposes of new Part II of Title II.[75] As demonstrated above, the distinction between ILECs and new entrants is fundamental to the 1996 Act's efforts to open the telecommunications marketplace to increased competition. Section 251 embodies Congress' determination that minimizing interconnection and unbundling obligations on new entrants is critical to "the development of competitive markets." Pursuant to its authority to implement the requirements of Section 251, the Commission is empowered to preclude enforcement of State rules that are inconsistent with the specific interconnection and unbundling obligations imposed upon CLECs and ILECs in Section 251.

Unfortunately, a number of States already are attempting to establish a "one size fits all" regulatory scheme that contravenes the 1996 Act. By imposing unnecessary burdens on new entrants, such a scheme will serve only to deter the development of alternatives to ILECs.

The Colorado Public Utilities Commission ("CoPUC"), for instance, has adopted new interconnection and unbundling rules that impose the same interconnection requirements on

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[74] Id.

[75] See 47 U.S.C. § 251(d)(3). New Part II is titled "Development of Competitive Markets."

incumbents and new entrants.[76] The CoPUC's rules also establish a presumption that new entrants will be required to comply with network unbundling requirements three years after certification, absent a specific CoPUC determination to the contrary. In adopting these rules, the CoPUC held that the 1996 Act "does not specifically command that incumbents and new entrants be treated differently under State regulation" and does not "expressly prohibit States from requiring new entrants to unbundle."[77]

Likewise, the Connecticut Department of Public Utility Control ("DPUC") has recently opened a proceeding to examine, inter alia, "the need for -- and benefit (if any) of -- a minimum investment threshold and/or minimum penetration level" as a precondition for imposing unbundling and resale requirements on new entrants.[78] Given the clear delineation between incumbents and new entrants in the 1996 Act, there is no need or justification for embarking on such an inquiry.

The New York Public Service Commission's ("NYPSC's") decision to require new entrants to resell their services at wholesale rates[79] is another example of State regulation that

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[76] Proposed Rules Regarding Implementation of §§ 40-15-101 et. seq. -- Requirements Relating to Interconnection and Unbundling (adopted Mar. 29, 1996).

[77] Id. at 15, 53.

[78] DPUC Docket No. 94-10-04, DPUC Investigation into Participative Architecture Issues, Statement of the Scope of the Proceeding at 2 (adopted Mar. 5, 1996) (emphasis added).

[79] See Case No. 95-C-0657, Joint complaint of AT&T Communications of New York, Inc., MCI Telecommunications Corp., Worldcom, Inc. d/b/a/ LDDS WorldCom and the Empire Association of Long Distance Telephone Companies, Inc. Against New York Telephone Concerning Wholesale Provisioning of Local Exchange Service By New York Telephone Company and Sections of the New York Telephone's Tariff No. 900, Order Considering Loop Resale and Links and Ports Pricing, at 7 (issued and effective Nov. 1, 1995) ("New York Order"), modified on other grounds, Cases 95-C-0657, (continued...)

treats new entrants the same as ILECs in direct conflict with the 1996 Act. Under the NYPSC's rules, New York Telephone must base its wholesale rates on avoided costs, and new entrants must file cost studies if their rates are significantly different from those of New York Telephone.[80] Although all LECs must resell their services under the 1996 Act,[81] only ILECs must offer resale services based on wholesale rates.[82]

Likewise, Illinois has adopted an unbundling requirement for new entrants that is at odds with the 1996 Act's mandate that only ILECs must unbundle their networks.[83] The Illinois Commerce Commission has required Tier 1 ILECs and new LECs to comply with line-side interconnection rules that include unbundling requirements because "in those areas of the State for which a competitive local exchange carrier is certificated, customer choice and fair competition will be enhanced by establishing a symmetrical regulatory environment for each carrier with respect to network unbundling."[84]

79/ (...continued)
94-C-0095, 91-C-1174, Joint Complaint of AT&T Communications of New York, Inc., MCI Telecommunications Corp., Worldcom, Inc. d/b/a/ LDDS WorldCom and the Empire Association of Long Distance Telephone Companies, Inc. Against New York Telephone Concerning Wholesale Provisioning of Local Exchange Servivce By New York Telephone Company and Sections of the New York Telephone's Tariff 900, Order Considering Loop Resale and Links and Ports Pricing at 8 (denying reconsideration of application of resale requirement to new entrants (issued and effective Feb. 1, 1996).

80/ New York Order at 7, 9.

81/ See 47 U.S.C. § 251(b)(1) (delineating the duty not to prohibit and not to impose unreasonable and discriminatory conditions or limitations on the resale of telecommunications service).

82/ See id. § 251(c)(4)(A)

83/ Id. § 251(c)(3).

84/ Docket No. 94-0049, Illinois Commerce Commission On Its Own Motion: Adoption of Rules On Line-Side Interconnection and Reciprocal Interconnection, Interim Order, 1995 Ill. PUC LEXIS 229 at 19 (April 7, 1995).

Finally, the Massachusetts Department of Public Utilities ("MDPU") has placed restrictions on resale of services contrary to the 1996 Act.[85] The MDPU has declined to permit unlimited resale of Centrex, Flexpath, and business exchange service[86] and has denied the only request it has received to resell residential services.[87]

The Commission should make clear that the distinction between incumbents and new entrants in the 1996 Act is binding on the States. Requirements -- such as those adopted in Colorado and suggested in Connecticut -- that would saddle new entrants with obligations intended for incumbents would frustrate the growth of competition, in direct contradiction to the purposes of the 1996 Act. The Act does not permit State commissions to impose "on carriers that have not been designated as incumbent LECs any of the obligations the statute imposes on incumbent LECs,"[88] and the Commission is authorized pursuant to Section 251(d)(3) to preclude States from enforcing such obligations.[89] Congress expressly distinguished between the duties imposed on telecommunications carriers, CLECs, and ILECs respectively, and the States are bound to abide by those distinctions.[90]

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[85] All LECs must offer resale, see 47 U.S.C. § 251(b)(1), and ILECs must offer resale at wholesale rates. Id. § 251(c)(4).

[86] D.P.U. Docket 93-124 Compliance Filing (Jan. 13, 1994).

[87] D.P.U. Docket 94-165. Ameritel, Corp. (March 28, 1995). The MDPU denied Ameritel's tariff proposing to resell NYNEX residential service because Ameritel was a business and therefore by definition could not purchase NYNEX's residential service and because Ameritel did not propose to comply with the MDPU's billing and termination procedures. See D.P.U. 18448, Billing and Termination Procedures (Dec 19, 1977).

[88] See Notice ¶ 45.

[89] 47 U.S.C. § 251(d)(3).

[90] Cf. Notice ¶ 45.

C. The Commission Should Not Allow Resale of ILEC Services at "Avoided Costs" to Undermine Facilities-Based Competition

Congress expressed a strong and clear preference for facilities-based competition in the 1996 Act that is reflected in specific provisions of the legislation.[91] Congress regarded the establishment of facilities-based competition in the local exchange market as "the integral requirement" of the competitive checklist governing BOC in-region interLATA entry requests, because "it is the tangible affirmation that the local exchange is indeed open to competition."[92] Resale, by contrast, is important "[i]n markets where a facilities-based competitor is unlikely to emerge in the near term."[93]

The statutory preference for facilities-based competition is consistent with the Commission's own efforts to promote that objective.[94] Not only does facilities-based

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[91] For example, Section 271 of the Act requires the Bell Operating Companies to provide unbundled network access and interconnection to a facilities-based provider of local exchange service as a precondition to their entry into the interexchange business within their service areas. 47 U.S.C. § 271. In addition, Congress sought to promote two-wire competition by expressly restricting a LEC's ability to purchase cable companies within its service area, as well as a cable operator's ability to purchase a LEC within its franchise area. Id. at § 572. See also 141 Cong. Rec. H8465 (daily ed. August 4, 1995) (statement of Rep. Goodlatte ("[The bill] gives new entrants the incentive to build their own local facilities-based networks, rather than simply repackaging and reselling the local services of the local telephone company. This is important if the information superhighway is to be truly competitive."); 142 Cong. Rec. H1174 (daily ed. February 1, 1996) (statement of Rep. Watts) ("Real competition will occur only when there are facilities-based companies servicing many customers in major markets throughout the State of Oklahoma.").

[92] House Report at 76-77

[93] Id. at 72.

[94] Cf. Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, Report and Order, 9 FCC Rcd 6513, 6520 (1994) (requiring public mobile services licensees "to transmit from a constructed facility," rather than merely resell service in order to "further our public interest goal of promoting facilities-based competition in the public mobile services."); Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of (continued...)

competition provide consumers with the benefits of lower prices, but, unlike resale, it directly promotes accelerated innovation and deployment of new technologies.[95] Facilities-based competition also provides a durable mechanism for establishing "market forces, rather than rate regulation, as a means of protecting consumer interests," and thus represents the most effective means of driving prices to cost.[96] In addition, the Commission has recognized that facilities-based competition fosters "the economical and efficient provision" of service to the public and promotes greater responsiveness to "customer needs in terms of price, service, quality and service availability."[97]

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[94] (...continued)
Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order, 8 FCC Rcd 3359, 3384 n.79 (1993) (program competition will not occur without the development of alternative facilities to deliver programming), citing H.R. Rep. No. 862, 102d Cong., 2d Sess. 93 (1992) (the Commission shall encourage arrangements that promote the development of new technologies providing facilities-based competition).

[95] See Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers, Notice of Proposed Rulemaking, CC Docket No. 94-54, FCC No. 95-505 at ¶ 10 (released Jan. 11, 1996) ("Facilities-based competition can confer benefits on customers such as lower prices, accelerated innovation, and deployment of new technologies.").

[96] See Petition of Arizona Corporation Commission to Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services and In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, 10 FCC 7824, 7831 ¶ 25 (1995).

[97] American Tel. & Tel. Co., Memorandum Opinion, Order and Authorization, 6 FCC Rcd 2870, 2871 ¶ 9 (1991).

Indeed, the Commission has expressly noted that facilities-based competition is preferable to resale in several significant and material respects.[98] In the cellular context, the Commission has noted that "unrestricted resale potentially can adversely impact competition in the cellular industry by limiting facilities based competition."[99] The Commission also has noted that resale does not necessarily strengthen the quality of service provided to consumers: "In the case of service quality, . . . , it is not the number of competitors that is relevant, but whether there is any facilities-based competition . . .".[100]

On the other hand, resale plays an important role in stimulating price competition, facilitating the transition from monopoly to competitive provision of local exchange service[101] and ensuring that ILECs do not attempt to stifle emerging competition by pursuing predatory pricing strategies.[102] Resale also can be used to enable a facilities-based carrier to expand its service area, either while it is building out its network or on a permanent basis.

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[98] See e.g., Cellular Resale Policies, 7 FCC Rcd at 4008, ¶ 14; Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 2954, ¶ 156 (1989) ("Policy and Rules Concerning Rates for Dominant Carriers"); Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, Memorandum Opinion and Order, CC Docket No. 83-1376, FCC Docket No. 84-512, 1984 FCC Lexis 1559, at *21 n.27 (1984).

[99] Cellular Resale Policies 7 FCC Rcd at 4008, ¶ 14.

[100] Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd at 2954, ¶ 156. See also id. ("Only if rival networks are available to customers can competition be relied upon to help maintain service quality").

[101] See Owen Declaration at 3.

[102] The Commission has recognized that unrestricted resale is necessary to avoid predatory pricing. See, e.g., Resale and Shared Use of Domestic PSN Services, 83 F.C.C. 2d at 174; Resale and Shared Use of Common Carrier Services, 60 F.C.C. 2d at 298.

The "avoided cost" standard for calculating the wholesale discount preserves the viability of resale, but stops short of mandating a deep discount that would deter facilities-based competition. Deep resale discounts would distort the economic decisions of new entrants to buy services or build facilities[103] by undermining the ability of facilities-based entrants to compete with resale providers.[104] The use of an "avoided cost" standard which would exclude only short-run incremental costs from the retail rate, ensures that the resale discount does not create a market environment inimical to the emergence of facilities-based competition.[105]

Because the adverse competitive consequences associated with establishing too deep a discount clearly outweigh the risks attendant to setting a discount that is too low, the Commission's avoided cost standard should impose an interim maximum wholesale discount.[106] While the Commission correctly observes that the California Public Utilities Commission (CPUC) recently established interim wholesale rates based purportedly upon avoided costs,[107] the flaws in the CPUC approach illustrate the need to establish a maximum

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[103] See Owen Declaration at 12 ("an unduly generous wholesale discount would certainly reduce and might even eliminate potential entrants' incentives to construct long-lived facilities to serve local markets").

[104] See id.

[105] See id. at 3-4, 13-14. The House Commerce Committee's version of the legislation would have mandated resale rates that were "economically feasible to the reseller." H.R. 1555, 104th Cong. 1st Sess. § 101 (July 24, 1995) (emphasis added). Congress rejected this outcome-oriented approach in favor of the more limited "avoided cost" standard.

[106] See Owen Declaration at 12.

[107] Notice ¶ 183.

federal ceiling on the size of any wholesale discount derived from an avoided cost standard.[108] In particular, the CPUC examined historical costs rather than developing the forward-looking costs that must be assessed in order to meet the Act's mandate to base wholesale discounts upon costs that "will be avoided "[109] As a result of these errors, the CPUC established an excessive wholesale discount [110] While this type of flawed implementation of the avoided cost standard may be inevitable given informational constraints and methodological disputes, the impact of such errors on the development of facilities-based competition could be severe. By establishing an interim maximum wholesale discount of no more than 10 percent off retail rates, the Commission would reduce the risk that erroneous implementation of the avoided cost standard at the State level could stifle nascent facilities-based competition.[111]

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[108] See generally Owen Declaration at 27-30. For Pacific Bell, the CPUC established a 10 percent discount below its retail residential rates and a 17 percent wholesale discount for carriers serving business customers. Id. at 27. The avoided costs calculated by the CPUC were "based on nothing other than judgmental 'allocations' of the historical operating expenses reported by Pacific . . . . Indeed, rather than calculating avoided costs, the CPUC seems to have estimated the fully allocated costs of avoided services." Id.

[109] See id. at 28-29; 47 U.S.C. § 252(d)(3). These errors also arose in party because of inherent data constraints that the Commission itself has acknowledged are present in attempting to calculate avoided costs. See Notice ¶ 180; see also Owen Declaration at 3.

[110] See id. at 29 & Table 5.

[111] See id. at 41.

III. OPTIMAL INTERCONNECTION AND UNBUNDLING REQUIREMENTS

A. Interconnection

Section 251 mandates a "co-carrier" relationship among incumbent carriers and competitors.[112] In implementing the interconnection and unbundling requirements applicable to incumbents, the concept of "co-carrier" must be applied rigorously in order to foster competition in the local exchange marketplace.

1. Section 251(c)'s Bar on "Nondiscrimination" is Broader than that in Section 202

The standard established in Section 251(c) requiring ILECs to provide interconnection to co-carriers on a "nondiscriminatory" basis is a significantly higher standard than the "unjust or unreasonable discrimination" standard of Section 202. This higher standard reflects the distinction between the carrier-user relationship being regulated in Section 202(a) and the intercarrier relationship addressed in 251(c). In order to ensure that economic impediments to competition are removed, the incumbents' incentive to engage in anticompetitive practices has to be tempered with the requisite degree of regulation.[113] Thus, Section 251(c) requires strict scrutiny of any discrimination, not solely unreasonable discrimination.[114]

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[112] Conference Report at 121 ("The conferees note that the duties imposed under new section 251(b) make sense only in the context of a specific request from another communications carrier or any other person who actually seeks to connect with or provide services using the LEC's network.").

[113] 141 Cong. Rec. H8455 (daily ed. Aug. 4, 1995) (statement of Rep. Frelinghuysen).

[114] The conferees considered and rejected a version of Section 251 that applied a lower, "unreasonably discriminatory" standard to the actions of ILECs. See S. 652, 104th Cong. 1st Sess. § 101 (deleting Section 251(c)(2)(C)) (Draft, Nov. 27, 1995).

2. "Any Technically Feasible Point" Should Not Be Fixed

Interconnection arrangements between ILECs and CLECs should be designed to provide seamless call completion in the most efficient manner possible. This will allow CLECs to enter the local exchange marketplace in the most cost-effective manner, thereby facilitating competition. In order to promote such efficiencies, the "at any technically feasible point" requirement of Section 251(c)(2)(B) should be defined broadly and should not be static. A flexible and evolving definition for what constitutes a technically feasible interconnection point will permit the most efficient arrangements between ILECs and CLECs.

NCTA supports the Commission's proposal to define "any technically feasible point" to include access tandems, end offices, and any other technically feasible meet point, and to place the burden on the ILEC alleging that interconnection at a certain point would cause harm to the network.[115/] Under a meet point arrangement, each carrier would be responsible for its own construction and operation costs up to the meet point, and then equally share in the cost of the actual meet point space. In the event that carriers are unable to agree, a default meet point (e.g., at the tandem) should be applied.[116/]

3. "Equal in Type, Quality, etc." is a Floor, Not a Ceiling

The requirement of Section 251(c)(2)(C) that the interconnection provided by ILECs be "at least equal in quality to that provided by [the incumbent] to itself . . . or any other party"

[115/] Notice ¶ 56.

[116/] The Commission should be careful not to allow ILECs to use inability to agree on a meet point as an excuse to delay negotiation.

is the minimum standard to be met.[117] Accordingly, the ILEC should provide requesting telecommunications carriers the same technical interconnections that it uses for itself or its affiliates, or allows anyone else. If this is not technically feasible, the ILEC must then provide interconnection that is at least equal in quality from the perspective of the requesting carrier and the customer.[118]

NCTA supports the Commission's tentative conclusion that any form of interconnection already being provided should be presumed to be technically feasible for other ILECs to provide interconnection. This is consistent with prior Commission decisions applying the "technically feasible" standard.[119] NCTA also agrees with the Commission that it is appropriate for the Commission to place the burden on the ILECs to demonstrate that any interconnection arrangement is not technically feasible.[120]

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[117] 1996 Act, sec. 101, § 25 (c)(2).

[118] The "any technically feasible point" and "equal in type [and] quality" requirements must be read in tandem. Thus, an ILEC that provides substandard interconnection to an affiliate cannot avoid providing higher-quality interconnection that is technically feasible to a CLEC. Likewise, an ILEC cannot circumvent its duties by only offering interconnection on the same terms as that which is provided to its affiliate, if there are other technically feasible alternatives which better accommodate the requesting carrier.

[119] Cellular Declaratory Ruling, 2 FCC Rcd at 2914; Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1498 (1994) ("CMRS Second Report and Order"); Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, 7 FCC Rcd 811, 813 (1992) ("ONA Order").

[120] Notice ¶ 58. See CMRS Second Report and Order, 9 FCC Rcd at 1498-99. See also ONA Order, 7 FCC Rcd at 811. In addition, incumbent LECs should not be permitted to deny interconnection arrangements based on a claim that it is economically infeasible. Incumbent LECs should be required to engage in good faith negotiations to determine how the costs of an interconnection arrangement can be recovered. Such negotiated arrangements should include a provision that subsequent price decreases (continued...)

B. The FCC Should Adopt A National Collocation Policy Consistent With The Standards Established In Its Expanded Interconnection Proceedings

A clear, national, collocation policy is consistent with the Act and will facilitate entry by competitors, many of which do or will seek to provide telecommunications services in multiple States. New entrants are hampered by varying State regulations, which can require companies to design individual business and network operating plans to accommodate the regulatory nuances of each State. This is inefficient and creates needless delay in deploying facilities to provide consumers with competitive product offerings.

The language of Section 251(c)(6) embodies the underlying goal of the Commission's prior standards established in its Expanded Interconnection Orders.[121] As the Commission acknowledges, many of the States relied upon these rules to develop their own approaches to collocation.[122] Failure to adopt uniform national standards could undermine any progress that has been achieved in reliance on those prior standards. The Commission's readopted standards should clearly indicate that they are applicable to incumbent LECs only. Section 251(c)(6) is limited to incumbent LECs because of their control over bottleneck facilities. Thus, where states

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[120] (...continued)
will be applied if additional telecommunications carriers purchase the same interconnection arrangement. Mandated cost sharing will ensure that the requesting carrier benefits when additional carriers later select the same arrangement and contribute to the cost recovery.

[121] See, e.g., Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) ("Special Access Expanded Interconnection Order"); Special Access Physical Collocation Designation Order, 8 FCC Rcd 6909 (1993); Expanded Interconnection with Local Telephone Company Facilities, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5166, ¶¶ 31-32 (1994) ("Virtual Collocation Expanded Interconnection Order"); Local Exchange Carriers' Rates, Terms, and Conditions For Expanded Interconnection Through Virtual Collocation For Special Access and Switched Transport, Order Designating Issues For Investigation, 10 FCC Rcd 1116 (1995).

[122] Notice ¶ 67.

have adopted collocation policies that apply to new entrants as well, these policies are inconsistent with the 1996 Act and should be superseded by any national standards adopted by this Commission.[123]

C. Unbundled Network Elements

As the Commission recognizes, the duty to unbundle imposed upon ILECs by Section 251(c)(3) is critical to the goal of fostering competition in the local exchange market.[124] This obligation requires the adoption of national standards. State boundaries have no bearing on the unbundled network elements generally sought by competitors to provide local exchange services. As the Commission notes, telecommunications equipment has been provided by national manufacturers selling to a nationwide market, without substantial regional or State-to-State variation in equipment design.[125] Indeed, there is increasing uniformity in the list of network elements proposed by competitors in various State unbundling proceedings seeking to implement local exchange competition.[126]

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[123] See, e.g., N.Y. Pub. Serv. Comm'n, Order Instituting Framework for Carrier Interconnection, Case No. 94-C-0095 (Sept. 27 1995); Notice ¶ 69.

[124] Id. at ¶¶ 74-75.

[125] Id. at ¶ 79.

[126] Connecticut Dep't of Pub. Util. Control, DPUC Investigation into the Unbundling of the Southern New England Telephone Company's Local Telecommunications Network - Reopened, Decision, Docket No. 94-10-02 (Jan. 17, 1996) at 20, 52, Unbundling and Resale Stipulation at 2, 5 ("DPUC SNET Unbundling Investigation"); Colorado Pub. Util. Comm'n, In the Matter of Proposed Rules Regarding the Implementation of §§ 4-15-101 et seq. -- Requirements Relating to Interconnection and Unbundling, Decision C-96-347, Docket No. 95-R.556T (April 1, 1996) (adopting Rules 6.1 and 6.2, to be codified at 4-CCR-723-39-6.1, 6.2), recon. pending ("Interconnection and Unbundling"); Iowa Util. Bd., In re Local Exchange Competition, ARC 63 79 a at 1712-1716 (adopted April 5, 1996, effective May 29, 1996), Docket No. RMU-95-5, Iowa Admin. Bulletin, April 24, 1996 (see also Docket No. TCU-94-4); Illinois Commerce Comm'n, 83 Il Adm. Code Part 790; Maryland Pub. Serv. Comm'n, In the Matter (continued...)

Disputes over the required degree of ILEC unbundling have forestalled implementation of local exchange competition in many States due to prolonged and protracted litigation. The 1996 Act removes this impediment by empowering the Commission to require a minimum set of unbundled network elements to be provided by all ILECs immediately.

1. The Commission Should Identify A Minimum Set of Network Elements That Must be Unbundled That is Not Static, But Permitted to Evolve

In establishing a minimum set of unbundled network elements, the FCC should encourage the growth of facilities-based competition through an evolving list of unbundled network elements. The Commission should be clear, however, that any minimum set of unbundled network elements it identifies in no way limits the degree of unbundled network elements that

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126/ (...continued)
of the Investigation by the Commission on its own Motion into Legal and Policy Matters Relevant to the Regulation of Firms, Including Current Telecommunications Providers and Cable Television Firms, which may Provide Local Exchange and Exchange Access Services in Maryland in the Future, Order No. 71485, Case No. 8587 (Oct. 5, 1994) at 64 ("Regulation of Firms Providing Local Exchange and Exchange Access Services"); Michigan Pub. Serv. Comm'n, In the Matter, on the Commission's Own Motion, to Establish Permanent Interconnection Arrangements between Basic Local Exchange Service Providers, Proposal for Decision, Case No. U-10860 (Jan. 16, 1996) at 99; see also Michigan Pub. Serv. Comm'n, In the Matter of the Application of City Signal, Inc., for an Order Establishing and Approving Interconnection Arrangements with Ameritech Michigan, Case No. U-10647 (Feb. 23, 1995); New York State Dep't of Pub. Serv., ("The Telecommunications Competition II Proceeding: Level Playing Field Issues, Case No. 94-C-0095, Staff Report in Module 2 (Feb. 15, 1995) at 30 ("Competition II: Level Playing Field Issues"); New York State Dep't of Pub. Serv., The Telecommunications Competition II Proceeding: Universal Service Issues, Case No. 94-C-0095, Staff Draft Report in Module 1 (May 16, 1995) at 3-4 ("Competition II: Universal Service Issues"); Oklahoma Corp. Comm'n, In the Matter of the Rulemaking of the Oklahoma Corp. Comm'n to Establish Rules and Regulations for Local Competition in the Telecommunications Market, Proposed Rule 165-55-17-11, Docket No. RM950000019, effective July 1, 1996 ("Local Competition Rules"); South Dakota Pub. Util. Comm'n, ARSD Chapters 20:10:27-20 10:29; Washington Util. and Transp. Comm'n, Washington Util. and Transp. Comm'n v. US West Communications, Inc., Fourth Supplemental Order Rejecting Tariff Filings and Ordering Refiling; Granting Complaints in Part, Docket Nos. UT-941464, UT-950146, UT-950265 (Oct. 31, 1995) at 51-53 ("US West Communications, Inc.").

the ILEC must provide. By identifying a minimum set of unbundled elements that the incumbent must make available upon request, the Commission will reduce the likelihood of disputes over every request for unbundled network elements, and provide regulatory uniformity consistent with the nation-wide uniformity existing with respect to equipment.

As indicated above, the list of unbundled network elements submitted by competitive providers from State-to-State has been generally the same. While the list has evolved over time as competitors become more sophisticated and technology develops, the CLEC requests for unbundled elements have not been based on technology distinctions in State rules.[127]

NCTA proposes an illustrative minimum set of unbundled network elements that consists of:

- unbundled local loop transmission, trunk side local transport, and local switching;
- access to 911 and E911 services, directory assistance services, and operator services; and
- access to databases and associated signalling necessary for call routing and completion.[128]

The establishment of a national, illustrative, minimum set of standards recognizes the dynamic nature of the telecommunications industry and the competitive marketplace. On numerous occasions, the Commission has implemented regulations that were intended to evolve over time to accommodate the rapid technological innovation and growth occurring in the

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[127] Id. There is no reason for the existence of distinctions in the unbundled elements an ILEC is required to provide on a State-by-State basis. The Commission should develop one set of national standards to apply in all jurisdictions.

[128] Conference Report at 113; see also Senate Report at 19-20.

telecommunications marketplace.[129] These prior Commission decisions were based on the need to quickly respond to market changes, to prevent regulation from stagnating competitive entry, and to serve the Commission's objectives of creating an enduring regulatory regime for the marketplace to meet customer demand. Consistent with the Commission's prior policies, the unbundled network elements that ILECs must provide also should be permitted to evolve.

It is also appropriate, as the Commission has tentatively concluded, to presume that the unbundling of a particular network element by an ILEC (for any carrier) evidences the technical feasibility of providing the same or similar element on an unbundled basis in another, similarly structured LEC network.[130] Besides the basic logic of this conclusion, it is consistent with

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[129] Implementation of Sections 3(n) and 332 of the Communications Act, Third Report and Order, 9 FCC Rcd 7988, 8026-8028 (1994); Revision of Radio Rules and Policies, Memorandum Opinion and Order and Further Notice of Proposed Rule Making, 7 FCC Rcd 6387, 6390 (1992), modified on other grounds, 9 FCC Rcd 7183 (1994); Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 586, 588 (1991); Amendment of 47 C.F.R. § 73.658(j)(l)(i) and (ii), the Syndication and Financial Interest Rules, Order, 5 FCC Rcd 1814 (1990).

A number of States have followed a similar course. See Alaska Pub. Util. Comm'n, Re Glacier State Telephone Co., U-79-43 Order No. 6, 3 APUC 34 (1980); California Pub. Util. Comm'n, Re Competition for Local Exchange Service, Decision 95-01-054, 163 Pub. Util. Rep. 4th 155 (no page numbers) (1995); Connecticut Dep't of Pub. Util. Control, DPUC Investigation into the Unbundling of the Southern New England Telephone Company's Local Telecommunications Network-Reopened, Decision, Docket No. 94-10-02 at 52, Unbundling and Resale Stipulation at 5 (1996) ("DPUC Investigation into SNET Unbundling"); Ohio Pub. Util. Comm'n, Re AT&T Communications of Ohio, Inc., Slip Opinion, Case No. 94-1893-CT-WVR, Case No. 94-1911-CT-WVR Case No. 94-1920-CT-WVR (no page numbers) (1996); Oregon Pub. Util. Comm'n, Re Open Network Architecture, AR 264 Order No. 93-852, 145 Pub. Util. Rep. 450 (no page numbers) (1993) (similar state conclusions concerning implementation of evolving regulations to assist the promotion of competitive local exchange services.)

[130] Notice ¶ 87.

the Commission's historical treatment of assessing technical feasibility with respect to LEC interconnection provided to cellular and CMRS providers.[131]

In the context of Open Network Architecture ("ONA"), the Commission prohibited the Bell Operating Companies ("BOCs") from withdrawing services that were technically feasible on the basis that they were no longer technically feasible because new technology had been developed.[132] The Commission also has rejected arguments that a service is technically infeasible if the industry has developed a technical solution and a technical upgrade would accommodate the service.[133] Accordingly, consistent with prior Commission decisions, once a network element is made available by an ILEC, it should be presumed that it is technically feasible for other ILECs also to provide the network element.

NCTA also endorses the Commission's tentative conclusion that because Section 251(c)(3) imposes an affirmative duty on ILECs to provide unbundled elements, the burden should rest with them to demonstrate any claims of technical infeasibility to provide a particular unbundled network element.[134] This conclusion is also consistent with past practice.[135].

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[131] Cellular Declaratory Ruling, 2 FCC Rcd at 2914 (Commission refused to permit incumbent LECs to argue that Type 2 interconnection is technically infeasible when the LECs had made Type 2 interconnection available to cellular carriers for years); CMRS Second Report and Order, 9 FCC Rcd at 1498 (Commission extended LEC interconnection requirement to CMRS providers, requiring LECs to accept a CMRS provider's request for any form of interconnection made available to any other carrier).

[132] ONA Order, 7 FCC Rcd at 811.

[133] Id. at 812-813 (denying Ameritech request for ONA waiver based on its technical infeasibility argument when the industry had already developed a technical solution).

[134] Notice ¶ 87.

[135] See CMRS Second Report and Order, 9 FCC Rcd at 1498 (LECs must meet their burden to demonstrate that the interconnection request by the CMRS provider is technically infeasible before they (continued...)

2. The Degree of Unbundling Required of ILECs Must be Sufficient to Provide Access to Necessary Facilities and Functions

The legislative history illustrates that the unbundling obligation imposed on ILECs was mandated to make available the facilities and functions necessary for local exchange competition to flourish.[136/] To this end, the Commission should begin from the general proposition that if the network element is necessary for the provision of a telecommunications service or for transport and termination, CLECs should have access to it on an unbundled basis.

The Commission's four broad categories of elements -- local loops, local switching, local transport, and databases and signalling -- reflect those elements for which there is little disagreement that CLECs may need them for transport and termination. These four categories, to the extent clarified below, should form the Commission's initial minimum set of unbundled network elements.[137/] Each of these unbundled network elements is being provided by an

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[135/] (...continued)
may refuse the CMRS provider's request. Id. The Commission determined that compelling LECs to interconnect with CMRS providers on these conditions was necessary to ensure that LEC-affiliated CMRS providers do not receive any unfair competitive advantages over other providers of CMRS. Id. at 1499. See also ONA Order, 7 FCC Rcd at 811 (the BOCs face a "high hurdle" to convince the Commission that they may withdraw a service because it is no longer technically feasible to provide.)

[136/] See 141 Cong. Rec. H8289 (daily ed. Aug. 2, 1995) (statement of Rep. Hastert) ("This bill provides the formula for removing the monopoly powers of local telephone exchange providers to allow real competition in the local loop. The long distance companies came to us early on with a list of areas (such as . . . unbundling) that give monopolies their bottleneck in the local loop. We agreed to remove the monopoly power in each and every one of those areas in our bill."); Id. at S8469 (daily ed. June 15, 1995) (statement of Sen. Pressler) ("The competitive checklist . . . is intended to be a current reflection of those things that a telecommunications carrier would need from a Bell operating company in order to provide a service such as telephone exchange service or exchange access service in competition with the Bell operating company. . . ."); Id. at H8464 (daily ed. Aug. 4, 1995) (statement of Rep. Hastings) ("This bill requires the Bell companies to interconnect with their competitors and to provide them the features, functions and capabilities of the Bell companies' networks that the new entrants need to compete.")

[137/] See id. at S8153 (daily ed. June 12, 1995) (statement of Sen. Breaux).

ILEC today and, thus, is easily classified as technically feasible to unbundle.[138] Once established, these minimum standards will eliminate the need for State review of unbundling needs, and provide new entrants with rapid access to the minimal facilities and functions necessary to enter and compete in the local exchange service marketplace.

a. Local Loops

Local loops currently are offered on an unbundled basis from local switching.[139] Thus, local loop unbundling should be required. Subloop unbundling, on the other hand, may

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[138] DPUC SNET Unbundling Investigation at 52, Unbundling and Resale Stipulation at 2 (local loops); Colorado Pub. Util. Comm'n, Interconnection and Unbundling (adopting Rules 6.1 and 6.2, to be codified at 4-CCR-723-39-6-6.1 6.2) (local loops, local switching, and local transport); Notice at ¶ 109; Hawaii Pub. Util. Comm'n, Instituting a Proceeding on Communications, Including an Investigation of the Communications Infrastructure of the State of Hawaii, Order, Docket No. 7702 (Aug. 14, 1995) at 3 (signalling links, signal transfer points, and service control points); Notice at ¶109; Iowa Util. Bd., In re Local Exchange Competition, ARC 63 79 A at 1712-1716 (adopted April 5, 1996, effective May 29, 1996) (see also Docket No. TCU-94-4); Illinois Commerce Comm'n, 83 Il. Adm. Code Part 790 (local loops; subloops also have been unbundled, but even Illinois has not addressed any specific requirements for subloop unbundling -- rather Illinois has left such issue to the industry); Louisiana Pub. Serv. Comm'n, Regulations for Competition in the Local Telecommunications Market, General Order (March 15, 1996) (access to ILEC databases for all services that the incumbent LEC provides itself); Notice at ¶ 109; Maryland Pub. Serv. Comm'n, Regulation of Firms Providing Local Exchange and Exchange Access Services, at 64 (local loops, local switching, local transport, and signalling); New York State Dep't of Pub. Serv., Competition II: Level Playing Field Issues at 29 (databases); New York State Dep't of Pub. Serv., Competition II: Universal Service Issues, at 3-4 9 (databases); Oklahoma Corp. Comm'n, Local Competition Rules, Proposed Rule 165:55-17-11, effective July 1, 1996 (local loops, local switching, local transport, signalling); South Dakota Pub. Util. Comm'n, ARSD Chapters 20:10:27-10:10:29; (local switching, local transport); Washington Util. and Transp. Comm'n, US West Communications, Inc., at 51-53 (local loop).

[139] Connecticut Dept. of Pub. Util. Control, DPUC Investigation into SNET Unbundling, at 52, Unbundling and Resale Stipulation at 2 (local loops); Colorado Pub. Util. Comm'n, Interconnection and Unbundling (adopting Rules 6.1 and 6.2) (local loops, local switching, and local transport); Iowa Util. Bd., In re Local Exchange Competition, ARC 63 79 A at 1712-1716 (see also Docket No. TCU-94-4); Illinois Commerce Comm'n, 83 Il. Adm. Code Part 790 (local loops); Maryland Pub. Serv. Comm'n, Regulation of Firms Providing Local Exchange and Exchange Access Services, at 64 (local loops, local switching, local transport, and signalling); Oklahoma Corp. Comm'n, Local Competition Rules, Proposed Rule 165:55-17-11 (local loops local switching, local transport, signaling); Washington Util. and Transp. Comm'n, US West Communications, Inc., at 51-53 (local loop).

not be technically feasible, nor may it be necessary to achieve the goals of the Act. The Commission should refrain from subelement loop unbundling at this time unless there is a clear need for such unbundling for purposes of transport or termination.

b. Local Switching

Unbundled local switching also should be designated as a network element.[140/]

c. Local Transport

Local transport from the trunk side of an ILEC switch unbundled from switching and other services also should be designated as a required unbundled network element. As the Commission notes, these facilities already have been required to be unbundled pursuant to its Expanded Interconnection policy.[141/] Thus, as discussed above, those facilities or functions provided on an unbundled basis should be presumed to be technically feasible and designated as an unbundled network element that ILECs must provide to requesting carriers.

d. Databases and Signalling Systems

All telecommunications service providers should have access to ILEC 911, E911, directory assistance, operator assistance and call completion capabilities on the same terms and conditions as the ILEC. In addition, CLECs must be allowed to include their customers' telephone numbers in ILEC directory assistance databases and directories, line information database (LIDB), and other operator services at the same price, terms and conditions as the ILEC.

[140/] Notice ¶ 98.

[141/] Id. at ¶ 104.